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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 01 2010
LIN 07 065 54074

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner has had the continuing ability to pay the proffered wage.[2]

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

For the reasons stated below, the AAO concurs with the denial of the petition based on the petitioner's failure to establish its continuing financial ability to pay the proffered wage.

The petitioner seeks to sponsor the beneficiary as a member of the professions holding an advanced degree pursuant to section 203(b)(2) of the Act. The regulation at 8 C.F.R. § 204.5(k)(2) provides that "an advanced degree means any degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree."

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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[1] After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

[2] The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. The petitioner must also demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 14, 2003, which establishes the priority date.[3] The proffered wage is stated as $86,000 per year.

Part B of the ETA 750, signed by the beneficiary on March 21, 2003, indicates that the petitioner has employed him since July 2002.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.

On Part 5 of the Immigrant Petition for Alien Worker (Form I-140), filed on January 3, 2007, the petitioner claims that it was established in 1998, has a gross annual income of over five (5) million dollars and net annual income that is "enough to pay alien's salary." It also claims that it has sixty (60) employees.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

At the outset, it is noted that the director issued a request for evidence on November 15, 2007, directing the petitioner to provide proof of its ability to pay the proffered wage of $86,000 per year. The director acknowledged receipt of some financial documents and requested copies of the petitioner's 2003, 2004, and 2006 federal tax return and a copy of the beneficiary's W-2s, Form 1099s and and/or other documentation for any period that he had worked for the petitioner. He observed that the petitioner had filed multiple petitions and that several of them contained 2005

[3] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

federal tax returns that featured different figures from other tax returns filed for the same years. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Therefore, the director requested that the petitioner obtain the Internal Revenue Service (IRS) transcripts for the 2005 and 2006 federal tax returns.

The director also noted that the petitioner had filed multiple I-140 petitions, and that it is incumbent upon the petitioner to establish its ability to pay the total amount of the proffered wage(s) for all beneficiaries. The director requested a list of the pertinent receipt numbers of petitions filed, name and date of birth of the beneficiary, permanent job offered and the proffered wage. The director additionally noted that if the petitioner is unable to demonstrate the ability to pay the respective proffered wage for all beneficiaries, it must identify which petition or petitions that would be supported by its ability to pay.

In reviewing a petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage for that period. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period.

In determining the petitioner's continuing financial ability to pay the proffered wage, USCIS will generally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The financial documentation submitted to the record by the petitioner included copies of its Form 1120, U.S. Corporation Income Tax for 2003 and 2004, as well as Form 1120S, U.S. Income Tax Return for an S Corporation for 2005, 2006, and 2007, which were provided on appeal. On appeal, the petitioner also provided additional copies of its federal corporate tax returns for 2005, 2006, and 2007. These three returns (2005, 2006, and 2007) were prepared according to the accrual accounting method. They are not the returns filed with the IRS, but the petitioner submitted them to illustrate the difference in figures if the accrual method was used to prepare them so as to better support the petitioner's assertion of its continuing financial ability to pay the proffered wage. The petitioner's tax returns that were actually filed with the IRS were prepared pursuant to the cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to the accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

However, this office is not persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seek to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose in presenting tax returns prepared based on a different method. If revenues are

not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to an accountant's adjustments. That said, the information provided on the returns submitted to the IRS indicates the petitioner's fiscal year is a standard calendar year. The returns contain the following:

	2003	2004
Net Income[4]	$ 48,209	$61,345
Current Assets	$149,018	$87,149
Current Liabilities	$ n/a	$45,377
Net Current Assets	$149,018	$41,772

	2005	2006	2007
Net Income[5]	$102,697	$128,753	$401,454

[4] As indicated, for 2003 and 2004, the petitioner filed its federal income tax returns as a C corporation. On Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). U.S. Citizenship and Immigration Services (USCIS) uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

[5] The petitioner filed as an S Corporation in the remaining years. Where an S Corporation's income is exclusively from a trade or business, United States Citizenship and Immigration Services (USCIS) considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2005), and line 18 (2006) and

Current Assets	$ 74,780	$ 86,602	$260,385
Current Liabilities	$220,150	$377,686	$304,962
Net Current Assets	-$145,370	-$291,084	-$ 44,577

As illustrated in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also submitted copies of W-2s reflecting that they were issued by the petitioner to the beneficiary in 2003, 2004, 2005, 2006 and 2007. These documents indicate:

Year	Amount of Wages	Difference from Proffered Wage of $86,000
2003	$59,500	$26,500
2004	$41,800	$44,200
2005	$48,313.30	$37,687
2006	$70,202.73	$15,797.27
2007	$70,432.11	$15,567.89

The director denied the petition on April 5, 2008. He noted that in response to the director's request for evidence, the petitioner had submitted federal tax returns, W-2s for the instant beneficiary and other beneficiaries, an incomplete list of other I-140 petitions filed by the petitioner, bank statements, evidence of assets in India and a request that the petitioner's line of credit be considered in the determination of the petitioner's ability to pay the proffered wage.

(2007) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on Schedule K for 2005, 2006 and 2007, the petitioner's net income is found line 17e and 18 on Schedule K of its 2005, 2006 and 2007 tax returns.

[6] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The director declined to consider the petitioner's bank statements, line of credit and holdings in India as determinative of the petitioner's ability to pay the proffered wage.

The director noted that although it appears that the petitioner would have the necessary additional funds to cover the difference needed to cover the instant beneficiary's full proffered wage, the petitioner could not establish its ability to pay for all of its sponsored workers. With respect to the evidence of other sponsored beneficiaries that the petitioner identified, the director found that the nine beneficiaries as accounted for by the petitioner, would require $660,000 in wages in 2005 and $754,000 for wages in 2006. The same nine were paid wages of $182,392.11 in 2005 and $373,792.48 in 2006. Therefore, the director found that additional funds of $477,607.89 in 2005 and $380,207.52 in 2006 would be needed to pay these nine beneficiaries their respective salaries at a level equal to each of their proffered salaries. The evidence does not establish the petitioner's ability to pay these total proffered wages owed for 2005 or 2006 and therefore does not establish the ability to pay the instant beneficiary's proffered wage.

The director continued to determine that the list of all I-140 petitions filed had not been provided by the petitioner, which claimed only nineteen pending petitions and submitted a llist of an additional eight petitions that it desired to withdraw. The director noted that even accounting for the requested withdrawals, a complete list of all petitions and sponsored beneficiaries would have included at least 50 I-140 petitions. As the petitioner must establish that every job offer is realistic and must demonstrate the ability to pay each respective proffered wage until each beneficiary has obtained lawful permanent residence, then without a complete accounting, the petitioner's ability to pay the proffered wage has not been established.

The AAO would further note that the petitioner has filed additional nonimmigrant and immigrant petitions subsequent to the priority date of the instant petition. USCIS electronic records indicate that as of September 3, 2010, the petitioner, [redacted] has filed 546 nonimmigrant and immigrant petitions in the past six years.[7] Of these, over 450 have been non-immigrant petitions and approximately 100 immigrant petitions. The petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Thus, even while considering covering the nine sponsored beneficiaries proposed by the petitioner, as noted by the director, after attempting to cover the total proffered wages out of the petitioner's net income or net current assets for these years, the petitioner would have negative net income and negative net current assets remaining to pay the other sponsored workers.

[7] The electronic records also indicate that [redacted] filed 82 nonimmigrant and immigrant petitions between 2001 and 2003.

Further, as noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate its continuing ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. This obligation applies not only pending petitions, but petitions that had been approved where permanent residence has not yet been achieved. Given the significant numbers petitioned for by this employer, without information relevant to each sponsored beneficiary, it is not possible to calculate the petitioner's total wage obligation or demonstrate its continuing ability to pay the respective proffered wages. This information has not been provided. None of the wages paid to the beneficiary reflect that he has been paid the full proffered wage of $86,000 in any of the relevant years. Therefore the petitioner's ability to pay the certified salary to this beneficiary has not been established by full payment of the proffered wage. Without specific information provided as to the other beneficiaries that the petitioner has sponsored, a positive determination of the petitioner's ability to pay may not be made. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)).

It is noted that counsel asserts that the petitioner's payments to subcontractors in the amounts of $1,261,426 in 2005, $978,476 in 2006 and $1,078,967 in 2007 must be considered in the petitioner's ability to pay the proffered wage in this proceeding because had the beneficiaries of multiple I-140 petitions been employed, the funds covering the employment of subcontractors could have been expended to cover beneficiaries' salaries and not used to pay subcontractors. The AAO is not persuaded by this hypothesis. Undocumented assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). It is unclear exactly which sponsored beneficiaries to whom counsel is referring. Further, many of these beneficiaries may have already been employed by the petitioner in a non-immigrant status, and thus, would not replace subcontractors. As noted by the director, a complete accounting of the sponsored I-140 beneficiaries and the petitioner's total wage obligation has not been made. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Additionally, the record does not identify any of the subcontractors to whom counsel is referring. The evidence does not state their wages, verify their full-time employment, duties, or provide evidence that the petitioner has replaced or will replace them with other sponsored beneficiaries. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Counsel asserts that the petitioner's line(s) of credit at two banks must be considered in support of its ability to pay the proffered wage. A letter from the PNC Bank, dated December 18, 2007, indicates that the petitioner established a $200,000 line of credit on December 22, 2004. The available balance as of the date of the letter is $70,118.00. Another undated letter from the WSFS Bank indicates that a $150,000 line of credit was established on September 7, 2004. The current balance is $75,509.71. Counsel cites *Full Gospel Portland Church v. Thornburgh,* 730 F. Supp. 441, 730 F. Supp. 441 (D.D.C. 1988), *rev'd in part on other grounds,* 927 F.2d 628

(D.C. Cir. 1991) in support of his assertion that a petitioner may rely on a line of credit similar to a pledge of support from a larger church to a local church. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit will not be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying a certified salary.[8]

Further, counsel's reliance on *Full Gospel Portland Church v. Thornburgh* is misplaced. The case in *Full Gospel Portland Church v. Thornburgh* involved the consideration of whether an alien was a "professional" within the meaning of 8 U.S.C. § 1101(a)(32). With reference to the ability to pay the proffered salary, the court noted that a parish church may rely upon the financial support of the parent nation-wide church. In this matter, although the AAO may consider the guidance suggested in that case, it is noted that the rationale of *Full Gospel* is not binding in this regard. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Moreover, the same district court, in a case involving the determination of whether an alien could be classified as a special immigrant religious worker, more recently found, that as the parent church organization would not be paying the local religious workers' salaries, the assets of the parent church were irrelevant in evaluating a local church petitioner's ability to pay the proffered wage. *Avena v. INS,* 989 F. Supp. 1, 8 (D.D.C. 1997). In this matter, a line of credit does not represent an unrestricted pledge from a parent church, but merely the petitioner's own line of credit with a corresponding debt and liability.

With respect to the petitioner's bank statements submitted to support its ability to pay the proffered wage in during the relevant period, it is noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's

[8] Additionally, even if considered as a source of funds, which we do not accept, the amounts would be insufficient for the petitioner to establish its ability to pay for all of its workers.

ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Bank statements show the amount in an account on a given date, and do not generally show a sustainable ability to pay a proffered wage because they do not reflect the petitioner's encumbrances that may affect its financial profile. Further, in this matter, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not listed on the corresponding tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was already considered in determining the petitioner's net current assets.

Counsel renews the argument on appeal that the petitioner's Indian assets should be considered in its ability to pay the proffered wage to the beneficiary. This property purportedly consists of a 70% stock ownership in a company in India called "Qualitree Solutions Private Limited" (Qualitree). The documentation submitted indicates that Qualitree is a corporation. According to a letter, dated December 26, 2007, submitted on appeal, the value of the petitioner's investment is $763,401. However, as noted by the director, there is no evidence in the record that establishes that the stock held in a separate foreign corporation could be easily liquidated making it readily available to pay wages in the U.S. or other current obligations. As noted by the director, corporations are distinct legal entities from its owners and shareholders, and the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). It is noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel asserts that the petitioner established its ability to pay in 2003 because the proffered wage must be prorated as of the priority date of April 14, 2003 through December 2003. Counsel divides the annual proffered wage by 12 (months) to calculate a monthly proffered wage of $7,166.66. Then by prorating the ability to pay as of the priority date of April 14, 2003, counsel states that the monthly obligation is $64,499.94 by calculating 9 (months) at $7,166.66 per month. With regard to a prorated calculation of the corporate petitioner's ability to pay the proffered wage in 2003, it is noted that in general, USCIS will not consider 12 months of income, as shown for example on the federal income tax return, towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains specific evidence of net income or, for example payment of the beneficiary's wages specifically covering that portion of the year that occurred after the priority date (and only that period), that is not the case here. Here, the evidence is the 2003 federal income tax return or, as stated above, the beneficiary's W-2, are documents which are both based on annual figures, and not on a prorated calculation.

It is noted that in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967), as cited by counsel, is a case in which the appeal was sustained where other circumstances were found to be applicable in supporting a petitioner's reasonable expectations of increasing business and increasing profits despite evidence of past small profits. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As noted above, the petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Further, as noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate its continuing ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. This would cover not only pending petitions, but where petitions that have been approved, permanent residence has not yet been obtained as of each respective priority date. Given the high numbers of petitions filed, and the lack of information from which to calculate whether the same set of financials can accommodate all sponsored beneficiaries, it may not be concluded that this petitioner has demonstrated that ability. In the present case, although the petitioner has shown an increase in gross receipts from approximately five million to seven million from 2005 to 2007, respectively, it must be viewed in the context of the hundreds of non-immigrant and immigrant petitions that it has filed and the petitioner's concurrent total wage obligation. Further, the petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonegawa* are applicable.

Additionally, it is noted that in a decision dated February 5, 2007, the Supreme Court of Delaware affirmed a Superior Court decision awarding damages to a former employee of the corporate petitioner for a variety of wrongful employment practices including a claim for unpaid wages and intentional infliction of emotional distress. *See Tekstrom, Inc. and Charan Minhas v. Sameer K. Savla,* 918 A.2d 1171, 2007 WL 328836 (Del. Supr.) Looking at the record, as well as the petitioner's sponsorship of other multiple beneficiaries during this period and corresponding burden to demonstrate the continuing ability to pay the proffered wage for all sponsored aliens as of each respective priority date, we do not conclude that this case is

analogous to the circumstances set forth in *Sonegawa* or that the petition merits approval on this basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, at145. (AAO's *de novo* authority well recognized by federal courts).

Additionally, the petition may not be approved pursuant to a September 23, 2010, Memorandum from [redacted], listing the petitioner, [redacted] as subject to debarment. Pursuant to the [redacted] Memo, petitions filed by the petitioner may not be approved for a period of one year, commencing on July 31, 2010 and ending on July 31, 2011.

The petitioner in this case, [redacted] under its former name of [redacted][9] Inc., was the subject of an investigation by the DOL in accordance with alleged violations of the INA and corresponding H-1B provisions of the Act. As result, on March 25, 2009, the U.S. District Court in Delaware entered an order granting the government's motion for summary judgment against Cyberworld Enterprise Technologies, Inc. d/b/a Tekstrom, Inc. *See Cyberworld Enterprise Technologies, Inc. d/b/a Tekstrom, Inc. v. Napolitano,* 2009 WL 875424 (D. Del. March 25, 2009). The court noted that since "1999, Cyberworld has petitioned for and hired approximately 600 nonimmigrant workers with H-1B visas." *Id.* On appeal, the Third Circuit affirmed the Secretary of the Department of Homeland Security's authorization to impose the debarment sanction. *See Cyberworld Enterprise Technologies, Inc. d/b/a Tekstrom, Inc. v. Napolitano,* 602 F3d 189 (3d Cir. 2010). Therefore, as Cyberworld Enterprise Technologies, Inc. was operating as and through Tekstrom Inc., and the September 23, 2010 Neufeld Memorandum references "doing business as [redacted] the debarment sanction applies to [redacted] as a named entity in the debarment memorandum. *See generally* 20 C.F.R. § 655 related to Temporary Employment of Aliens in the United States; and 8 C.F.R. § 214.2(h) provisions related to H-1B non-immigrants. If DOL determines that there has been a violation of 20 C.F.R. § 655, then under 20 C.F.R. § 655.855(c), USCIS shall not approve a petition during the debarment period: USCIS "shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for the period of time provided by the Act and described in Sec. 655.810(f)."[10]

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[9] In a letter, dated December 22, 2006, contained in the record, the petitioner acknowledged that it was known as CyberWorld Enterprise Technologies, Inc.

[10] We note that certain statutes that preclude USCIS from approving applications effectively require that USCIS deny the application. For instance, the language of Sections 204(c), (d), and (g) of the Act all similarly provide that "notwithstanding [the relevant applicable subsections] . . . no petition shall be approved if [the following facts are present]." Further, on October 21, 1998, President Clinton signed into law the Omnibus Consolidated and Emergency Supplemental

USCIS may not approve a nonimmigrant or immigrant petition during the debarment period, regardless of when it was filed. Accordingly, the instant petition must be denied as the petition became ready for adjudication during the period of debarment.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Appropriations Act for Fiscal Year 1999, which incorporated several immigration-related provisions, including the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). ACWIA mandated new requirements for petitioners filing for H-1B beneficiaries. Pursuant to ACWIA, penalties were established for H-1B violations on a three tier system: (1) the first tier would encompass non-willful conduct, or less substantial violations such as failure to meet strike, lockout or layoff attestations; failure to meet notice or recruitment attestations; or misrepresentation of a material fact on a labor condition application, and would result in fines of not more than $1,000 per violation and result in the mandatory debarment of at least one year. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(i) of the Act; (2) willful violations, such as willful failure to meet any attestation condition; willful misrepresentation; or actions taken in retaliation against whistleblowers, which would result in a fine of not more than $5,000 per violation, and mandatory debarment of two years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(ii) of the Act; and (3) willful violations that result in layoffs, such as a violation of the attestation, or misrepresentation of a material fact in the course where an employer displaces a U.S. worker, which would result in a fine not to exceed $35,000 per violation, and mandatory debarment of at least three years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(iii) of the Act.